Supreme Court, U.S.
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No.

# In The
# Supreme Court of the United States

LEA ANN WILKINSON (SURVIVING SPOUSE) FOR SCOTT R. WILKINSON (DECEASED EMPLOYEE),
*Petitioner*,

v.

PALMETTO STATE TRANSPORTATION CO., EMPLOYER, AND CANAL INSURANCE CO., CARRIER,
*Respondents*.

*On Petition for Writ of Certiorari to The Supreme Court of South Carolina*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Supreme Court of South Carolina violate petitioner's right to due process by addressing an issue not presented on appeal, by reversing itself on that issue without allowing Petitioner an opportunity to address the issue, and by announcing a new standard without remanding the claim for a hearing to give Petitioner an opportunity to present evidence to meet the new standard?

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## OPINIONS BELOW

The opinion of the South Carolina Supreme Court, dated May 4, 2009, is officially reported at *Wilkinson v. Palmetto State Transp. Co.*, 676 S.E.2d 700 (2009) and is reproduced in Appendix A, infra, at pp. 1a-15a. The opinion of the South Carolina Court of Appeals, dated November 20, 2006, is officially reported at *Wilkinson v. Palmetto State Transp. Co.*, 638 S.E.2d 109 (2009) and is reproduced in Appendix B, infra, at pp. 16a-29a. The opinion of the circuit court for Greenville County is reproduced in Appendix C, infra, at pp. 30a-45a. The award and orders of the South Carolina Workers' Compensation Commission are reproduced in Appendix D, infra, at pp. 46a-49a, and at Appendix E, infra, at pp. 50a-74a.

## JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on May 4, 2009. A timely petition for rehearing was denied on May 28, 2009. *See* Appendix F, pp. 75a-76a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the denial of the petition for rehearing.

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is Amendment 14, Section 1 of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case arises from a claim made under the South Carolina Workers' Compensation Act. While workers' compensation is under normal circumstances solely a state concern, the South Carolina Supreme Court's decision in this case violated Wilkinson's right to due process guaranteed under the United States Constitution.

The South Carolina Workers' Compensation Commission found that Wilkinson was entitled to death benefits under the Act based in part on a standard of proof adopted by the South Carolina Supreme Court in an earlier, unrelated case that turned on a similar issue. *See* Appendix D, infra, at pp. 46a-49a, and Appendix E, infra, at pp. 50a-74a. *See also Dawkins v. Jordan*, 534 S.E.2d 700 (S.C. 2000). In *Dawkins*, the Court reiterated four factors normally relied on in determining whether the employer sufficiently controlled the injured worker – 1) direct evidence of the right or exercise of control; 2)

furnishing of equipment; 3) right to fire; and 4) method of payment – and then stated that

> "[F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all."

*Dawkins*, 534 S.E.2d at 703 (citations omitted)(quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §§ 61.04 (2000)).

Based on *Dawkins*, the Commission's award was affirmed by the circuit court for Greenville County and the South Carolina Court of Appeals. *See* Appendix C, infra, at pp. 30a-45a, and Appendix B, infra, at pp. 16a-29a. However, the state Supreme Court reversed the Commission's award. *See* Appendix A, infra, at pp. 1a-15a. Though the standard of proof was not challenged by any party, and Petitioner was given no notice of the issue to be addressed, the Supreme Court reversed the standard of proof it had previously adopted in *Dawkins* and adopted a new standard of proof. Specifically, the Court stated that

> We overrule the approach approved in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) that the presence of "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation." Consistent with pre-*Dawkins*' case

> law, the common law factors-right or exercise of control, method of payment, furnishing of equipment and right to fire-should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.

*See* Appendix A, p. 15a.

Utilizing this newly announced standard, the Supreme Court reversed the Commission and denied Wilkinson's claim without affording her the opportunity to address the change in standard or to present additional evidence in an attempt to meet the newly announced standard.

Wilkinson petitioned for rehearing according to the Supreme Court's rules, and in that petition specifically contended that the state Supreme Court had violated her right to due process under the law, but the Court summarily denied the petition. *See* Appendix F, pp. 75a-76a.

The federal question involved in this case arises directly from the United States Constitution, and specifically, the Fourteenth Amendment to the Constitution, which provides that a State shall not "deprive any person of life, liberty, or property, without due process of law" Here, the Supreme Court of South Carolina, unquestionably a state actor, has deprived Petitioner of her property, a claim for benefits under the South Carolina Workers' Compensation Act, without "due process of law" in that the Court reached an issue that was not before it without notice to

Petitioner and, after changing the standard of proof, failed to give Petitioner an opportunity to meet that standard.

## REASONS FOR GRANTING THE WRIT

Under the Fourteenth Amendment, the first question is whether Petitioner "has been deprived of a protected interest in 'property' or 'liberty.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). There is now little doubt that there is a property interest in a claim such as the one in this case involving a state workers' compensation claim. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See also Sullivan*, 526 U.S. at 62 (J. Ginsburg, concurring).

"Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Sullivan*, 526 U.S. at 59. This Court has clearly held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)(*Armstrong v. Manzo*, 380 U.S. 454, 552 (1965)). Further, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v. Manzo*, 380 U.S. 454, 550 (1965)(quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Due process requires notice of the specific

issue involved and a fair opportunity to address the assertions. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). *See also Lankford v. Idaho*, 500 U.S. 110 (1991).

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

## I. THE SUPREME COURT OF SOUTH CAROLINA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY ADDRESSING AN ISSUE NOT PRESENTED ON APPEAL WITHOUT NOTICE TO PETITIONER, BY REVERSING ITSELF ON THAT ISSUE WITHOUT ALLOWING PETITIONER AN OPPORTUNITY TO ADDRESS THE ISSUE, AND BY ANNOUNCING A NEW STANDARD WITHOUT REMANDING THE CLAIM FOR A HEARING TO GIVE PETITIONER AN OPPORTUNITY TO PRESENT EVIDENCE TO MEET THE NEW STANDARD.

As stated above, due process requires that a party be given notice and an opportunity to be heard on any issue to be met at hearing, trial, or appeal. *Hamdi*. "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)(quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951)(Frankfurter, J., concurring)). "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure," and "[w]ithout such notice, the Court is denied the benefit of the adversary process." *Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991)(judge's silence following the State's response to the presentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing). "[O]ur cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn." *Id.* at p. 126, fn. 22.

These principles were earlier recognized by the Supreme Court of South Carolina in a case where the Workers' Compensation Commission did just what the Court has done in this case – decided an issue the parties did not bring before it. *See Ham v. Mullins Lumber Co.*, 7 S.E.2d 712 (S.C. 1940). The *Ham* Court specifically noted that "the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government . . . .'" *Ham*, 7 S.E.2d at 717 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

The South Carolina Supreme Court ignored *Ham* and violated Petitioner's right to due process in multiple respects. The Court ignored the fact that neither Petitioner nor Respondents challenged the Court's decision in *Dawkins v. Jordan*, 534 S.E.2d 700 (S.C. 2000), and then changed a substantive rule of law without giving Petitioner notice or an opportunity to address the change.

In *Dawkins*, which was also a dispute concerning whether an injured worker was an employee or an independent contractor, the Court reiterated four factors normally relied on in determining an employment relationship:

> The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment.

*Dawkins*, 534 S.E.2d at 703 (citations omitted). Relying on a well-known and heavily-relied upon treatise in the workers' compensation setting, the *Dawkins* Court announced a method for determining whether an injured worker had met these factors:

> "[F]or the most part, any single factor is not merely indicative of, but, in practice, virtually

> proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all."

*Id.* (quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §§ 61.04 (2000)). Applying this new standard, the Court determined that the injured worker in *Dawkins* was an employee.

South Carolina's courts continued to follow the *Dawkins* standard in employee/independent contractor cases. *See e.g. Nelson v. Yellow Cab Co.*, 564 S.E.2d 110 (S.C. 2002); *Paschal v. Price*, 670 S.E.2d 374 (S.C. Ct.App. 2008).

Accordingly, Petitioner addressed this case to the Commission based on the *Dawkins* standard, and neither party to this case ever challenged that standard or argued that a different standard should apply. Neither the Commission nor the lower appellate courts which reviewed the case ever questioned the standard or intimated that a different standard should apply. Therefore, whether the *Dawkins* "framework" should apply to the circumstances of Petitioner's claim or whether the "framework" improperly skews the employee/independent contractor analysis was not previously at issue in the case, and Petitioner had no notice of the issue prior to the Court's ruling.

In that ruling, the South Carolina Supreme Court stated as follows:

We overrule *Dawkins*' analytical framework, for it most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions. FN3

> FN3. We overrule post-*Dawkins* appellate court decisions of this state to the extent those decisions relied on *Dawkins*' claimant-friendly approach. Those cases include *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002) and *Paschal v. Price*, 380 S.C. 419, 670 S.E.2d 374 (Ct.App.2008). We take no position with respect to the proper result in such cases under the pre-*Dawkins*' evenhanded and balanced approach. . . .

We reverse the court of appeals and find Wilkinson was an independent contractor for purposes of workers' compensation. As such, his estate is not entitled to benefits. We overrule the approach approved in *Dawkins v. Jordan,* 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) that the presence of "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation." Consistent with pre-*Dawkins*' case law, the common law factors-right or exercise of control, method of payment, furnishing of equipment and right to fire-should be evaluated in an evenhanded manner in determining whether

> the questioned relationship is one of employment or independent contractor.

*See* Appendix A, pp. 5a-6a, 15a.

Because Petitioner was not given notice that the Court was considering this change in the standard of proof on this issue, she was not given the opportunity to address the Court concerning the propriety of the change. The issue was never briefed or argued by the parties. In the words of *Lankford*, Petitioner was not given notice sufficient to enable her to identify and address the issues on which the Supreme Court's decision turned, and the issue was effectively concealed from her. Furthermore, the Court was denied the benefit of the adversary process.

Given the opportunity, Petitioner would have pointed out to the Court that while the Court describes the change as a "return" to prior jurisprudence, South Carolina has in fact never actually given the four factors equal weight but has instead consistently focused on one or two dispositive factors, which is essentially what Professor Larson was describing in the analysis this Court referred to in *Dawkins*. *See e.g. S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 459 S.E.2d 302 (S.C. 1995)(the "dispositive question is appellant's 'right and authority to control and direct [Chewning's] particular work or undertaking, as to the manner or means of its accomplishment'); *Tharpe v. G.E. Moore Co.*, 174 S.E.2d 397 (S.C. 1970)(turned on the "direct evidence of the right to or exercise of control" factor); *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 437 S.E.2d 48

(S.C. 1993)(turned on "right of control" and the "right to fire" factors); *Chavis v. Watkins*, 180 S.E.2d 648 (S.C. 1971)(the Court referred to the four factor test but did not discuss evidence concerning each of the four factors, the Court rather focused only on the "right to control" and the "method of payment" factors). These are, of course, the very cases the Court cited in stating that "[w]e return to our jurisprudence that evaluates the four factors with equal force in both directions." *See* Appendix A, p. 6a. The Court is actually returning to jurisprudence that never existed in the manner it describes.[1]

The Court further violated Petitioner's right to due process by failing to remand the claim to the Commission for a new hearing. Petitioner necessarily relied on the *Dawkins* framework when conducting discovery and presenting evidence to the Hearing

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[1] The effect of the Court's ruling on Petitioner's case and future employee/independent contractor cases involving truckers is overwhelming. Because of the impact of any written contract, which will invariably state the parties intend for the relationship to be that of an independent contractor, and the Federal regulations governing the trucking industry, the Court's change in the standard of proof will likely make it nearly impossible for injured truck drivers to prove that they were in fact operating as employees and not independent contractors. *See e.g.* Appendix A, pp. 8a-9a ("We agree that the strong regulatory presence concerning motor carriers reflects control by the government, not the motor carrier."). While purportedly attempting to fix a situation which "skews the analysis to a finding of employment," the Court has skewed the analysis firmly and decidedly toward a finding of an independent contractor relationship. And most significantly, it has done so by circumventing the adversary process and failing to give Petitioner an opportunity to address the issue.

Commissioner at the original trial of the case. The presentation of evidence to the Commissioner would have been very different had Petitioner known that the Supreme Court would apply another, more difficult, standard. Under these circumstances, Petitioner was deprived of an opportunity to meet deficiencies in the record created by the Court's change in the standard of proof. As stated by this Court in *Mathews v. Eldridge*, "[t]he essence of due process is the requirement that 'a person . . . (be given) notice of the case against him and opportunity to meet it.'" *Mathews*, 424 U.S. at 335. At a minimum, due process requires that Petitioner be afforded a hearing giving her an opportunity to present evidence under the new standard.

In this case, the South Carolina Supreme Court ignored its earlier jurisprudence and deprived Petitioner of her claim to workers' compensation benefits without due process of law as is required by the United States Constitution. The South Carolina Supreme Court's decisions to address an issue not presented to it by the parties, to overturn *Dawkins* and implement a new standard of proof on the employee/independent contractor issue, and to reverse the Commission without giving Petitioner notice of the issue and allowing her the opportunity to address it before the Court or before the Commission at a hearing means that she did not receive a hearing "in a meaningful manner."

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the Supreme Court of South Carolina reversed.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

**Opinion No. 26646**

**Heard January 22, 2009 – Filed May 4, 2009**

| | |
|---|---|
| Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased), Claimant, Respondent, | ) |
| v. | ) |
| Palmetto State Transportation Company, Employer, and Canal Insurance Company, Carrier, Petitioners. | ) |

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Pickens County
John C. Few, Circuit Court Judge

**REVERSED**

Duke K. McCall, Jr., of Leatherwood, Walker, Todd & Mann, of Greenville, for Petitioners.

Kathryn Williams, of Greenville, for Respondent.

**JUSTICE KITTREDGE:** This workers' compensation case involves the jurisdictional question of whether the claimant was an employee or independent contractor. We granted a writ of certiorari to review the court of appeals decision holding the claimant was an employee. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006). We reverse, and hold the claimant was an independent contractor for workers' compensation purposes. In connection with our jurisprudence in evaluating whether a claimant is an employee or an independent contractor for workers' compensation purposes, we overrule the test announced in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).[1]

Scott R. Wilkinson was a long-haul truck driver for Palmetto State Transportation Company. After a period of admitted employment, Wilkinson opted to alter his relationship with Palmetto, and the parties entered into a formal independent contractor arrangement. The detailed contract was honored by Wilkinson and Palmetto, including the provision giving Wilkinson sole authority over "the means and methods of the performance of all transportation services." In resolving this jurisdictional question, we view the evidence as clearly preponderating in favor of an independent contractor relationship.

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[1] In fairness to the court of appeals, the circuit court and workers' compensation commission, we are in essence reversing ourselves.

## I.

Palmetto is an interstate motor carrier. Wilkinson began as an employee for Palmetto, as a long-haul truck driver, in January of 1998. About a year later, Wilkinson and Palmetto agreed to alter their employment relationship to that of an independent contractor. To this end, Wilkinson purchased a tractor and the parties executed an "Equipment Lease Contract." The contract sets forth in detail the respective rights and responsibilities of the parties.

Of particular relevance in determining the nature of the parties' relationship are the following contract features. Wilkinson and Palmetto intended "to create the relationship of CARRIER and INDEPENDENT CONTRACTOR and not an EMPLOYER-EMPLOYEE relationship." The parties negotiated an increased rate per mile. Wilkinson was solely responsible for all expenses associated with acquiring, financing, maintaining and insuring the tractor. Wilkinson assumed further responsibility for "the means and methods of the performance of all transportation services," including, if necessary, hiring and supervising other drivers for the leased tractor. In this regard, the obligation for withholding and employment taxes fell to Wilkinson. Wilkinson also agreed "to carry Workers Compensation coverage in the limits statutory [sic] within the State of South Carolina." Wilkinson ultimately complied with this contract provision by purchasing an occupational accident policy from Zurich American Insurance Company, which provided for a lump sum of $50,000 and monthly payments of $2,000 for 100 months, in the event of

death.[2] Termination of the contract required thirty days' notice, and a wrongful termination entitled the non-breaching party to recover damages.

Wilkinson died on May 16, 2002, in a motor vehicle accident while driving his tractor for Palmetto. The Zurich policy was paid to Wilkinson's spouse, Lea Ann. Lea Ann also filed a workers' compensation claim, contending that her husband was Palmetto's employee. Palmetto, through its workers' compensation insurance carrier, defended on the basis Wilkinson was an independent contractor. The workers' compensation commission, circuit court and court of appeals found that Wilkinson was an employee, and therefore his spouse was entitled to workers' compensation benefits. The basis for this finding of compensability comes from the employee/independent contractor test announced in *Dawkins v. Jordan*, which we now overrule.

## II.

### A.

We are presented with the question whether Wilkinson was, at the time of his fatal accident, an employee or independent contractor. Because the question is jurisdictional, the Court may take its own view of the preponderance of the evidence. *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995).

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[2] This appeal raises no issue with respect to the amount of insurance coverage and the limits available under our workers' compensation laws.

Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. *Ray Covington Realtors*, 318 S.C. at 547, 459 S.E.2d at 303; *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. *Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970); *see also Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).

In *Dawkins*, this Court took the additional step of imposing a framework for weighing the standard factors in a manner that favored, unduly we now believe, a finding of employment:

> [F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

*Id.* at 439, 534 S.E.2d at 703 (quoting *Arthur Larson & Lex K Larson*, 3 LARSON'S WORKERS' COMPENSATION LAW § 61.04 (2000)). We overrule *Dawkins*' analytical framework, for it most assuredly skews the analysis to a finding of employment. We return to our

jurisprudence that evaluates the four factors with equal force in both directions.[3] *See Ray Covington Realtors*, 318 S.C. at 547-48, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe*, 254 S.C. at 198-200, 174 S.E.2d at 398-99.

**B.**

We are persuaded the four factors preponderate in favor of a finding that Wilkinson was an independent contractor. In evaluating the four factors, we are guided initially by the parties' independent contractor agreement. But more importantly, we are guided by the parties' conduct, which mirrored the terms of the contract. *See Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (noting that "in determining the nature of [the parties'] relationship," the contract "has considerable weight," but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive").

This Court remains sensitive to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage. That principle, however, does not go so far as to justify an analytical framework that preordains the result. Moreover, that principle should

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[3] We overrule post-*Dawkins* appellate court decisions of this state to the extent those decisions relied on *Dawkins*' claimant-friendly approach. Those cases include *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002) and *Paschal v. Price*, 380 S.C. 419, 670 S.E.2d 374 (Ct. App. 2008). We take no position with respect to the proper result in such cases under the pre-*Dawkins*' evenhanded and balanced approach.

not trump an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect. Materiality, in this context, is measured by the factors of right or exercise of control, method of payment, furnishing of equipment and right to fire. The policy considerations favoring a finding of compensability are further diminished where, as here, the independent contractor procures workers' compensation coverage or its functional equivalent.

1. Direct Evidence of the Right or Exercise of Control

It is not uncommon in the long-haul trucking industry for carriers to utilize drivers who own and operate their own tractors, known as owner-operators. These arrangements must be carefully scrutinized to ensure that the actual relationship between the trucking company and the purported independent contractor truly reflects the parties' stated agreement. We are sensitive to the unequal bargaining power that may exist between the trucking company and the driver. In this regard, it naturally follows that a trucking company, with a desire to avoid a workers' compensation claim, may be tempted to have "its cake and eat it, too." The result would be an ostensible independent contractor arrangement where the trucking company exercises almost complete control over the method and manner of the transportation services.

Cognizant of these concerns, we have reviewed the actual relationship between Wilkinson and Palmetto. Palmetto utilizes approximately eighty drivers in its business, the vast majority of whom are employees. Wilkinson started as an employee, but desired to drive

his own tractor and become an owner-operator. He did so, as reflected in the parties' contract.

As noted above, the contract provided that Wilkinson "shall determine the means and methods of the performance of all transportation services." We find that, true to the contract, Wilkinson exercised the right of control as to the transportation services. The fact that Palmetto contacted Wilkinson for potential assignments and provided the pickup location does not change the result. Wilkinson retained the right to refuse any assignment. If Wilkinson agreed to an assignment and made the pickup, he exercised complete control over the delivery and chose his travel routes without direction from Palmetto. The nature of the relationship between Wilkinson and Palmetto is incompatible with that of an employee-employer. Concerning the right and exercise of control, this factor favors a finding of an independent contractor relationship.

Before moving to the next factor, we address two matters which at first glance appear to evidence Palmetto's right of control. First is the presence of a global positioning satellite (GPS) system in each tractor. The record establishes, however, that GPS monitoring was for the benefit of Palmetto customers tracking shipment of goods, not Palmetto's exercise of control over drivers. Second is the presence of governmental regulatory controls affecting the transportation of goods in interstate commerce. The parties' contract required Wilkinson to operate "the equipment in accordance with all applicable regulations." We agree with the Pennsylvania Supreme Court that requiring a worker to comply with

the law is not evidence of control by the putative employer.

> [R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status. "The employer cannot evade the law . . . and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver."

*Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 762 A.2d 328, 335 (Pa. 2000) (citations omitted).

We agree that the strong regulatory presence concerning motor carriers reflects control by the government, not the motor carrier.[4]

2. Furnishing of Equipment

Wilkinson relies on the presence of Palmetto's insignia on the outside of the tractor, together with the display of Palmetto's Department of Transportation motor carrier number, as proof of an employment relationship. Even if Wilkinson's reliance on the Palmetto insignia and motor carrier identification number were a factor in his favor, it would be far from

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[4] The federal regulatory scheme is discussed in more detail below.

dispositive. *Universal Am-Can*, 762 A.2d at 332 (noting that "[t]he presence of a carrier's insignia on the outside of a rig is merely one of the many factors to be considered when determining employee/independent contractor status and does not command a conclusion of employee status"). The placement of a motor carrier's insignia and identification number on the tractor is required by federal regulations. 49 C.F.R. § 376.11(c)(1) (2008); 49 C.F.R. § 390.21 (2008).

We do not give controlling weight to the presence of Palmetto's insignia and identification number on Wilkinson's tractor. Again, we view the presence of Palmetto's insignia and identification number on the tractor as governmental control, not carrier control. On balance, we find the factor of "furnishing of equipment" points to an independent contractor relationship. We make this finding primarily because Wilkinson owned his own tractor and paid for all costs associated with the tractor.[5]

3. Method of Payment

Wilkinson was paid per mile, with an increase in the rate when he transitioned from an employee to an independent contractor. The method of payment was entirely consistent with Wilkinson's independent contractor status. Palmetto furnished "1099" forms to Wilkinson, who in turn filed tax returns as a sole proprietor, specifically an "over the road trucke[r]."

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[5] Wilkinson assumed responsibility for all costs, including fuel, oil, repairs, insurance, road taxes, fuel taxes, mileage taxes, and any weight violations, with the caveat that he would be reimbursed for weight violations if he picked up a sealed trailer.

Wilkinson's tax returns include forms for his business expenses and self-employment taxes. The method of payment bears no indicia of an employment relationship.

4. Right to Fire

This factor is the most difficult to evaluate for two reasons. One, unlike the other three factors, Wilkinson and Palmetto never had a need to confront this issue. Next is the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term "fire," for it embraces the employment relationship.

We are left with only the contract terms, and each party makes a strong argument. Wilkinson contends that the testimony of Palmetto's representative reflects a belief that Wilkinson could essentially be fired at will. Palmetto presented a host of reasons it believed it could terminate its relationship with Wilkinson. Those reasons (which never materialized) included a "consistent" refusal to haul loads and perceived poor work performance.

Palmetto counters that the "right to fire" does not exist under the parties' contract. According to Palmetto, the contract defined the terms under which the parties could terminate the relationship. Under the contract, either party could terminate the contract upon thirty days' notice. The agreement further provided that, "[i]n the event either party commits a material breach of any term of this Agreement; . . . the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages."

We find Palmetto did not have a "right to fire" Wilkinson. The termination of the parties' relationship was controlled by their agreement. The termination provisions, when viewed in the context of the agreement as a whole, leads to a finding of an independent contractor arrangement.

C.

We believe it helpful to address a related area of law, specifically the existence of federal law in the trucking industry. Although the parties raise no issue concerning the federal law, an overview of certain federal regulations serves to support our ultimate determination as well as inform the narrow reach of our decision.

Congress provides in 49 U.S.C.A. § 14102(a) (West 2007) that the "Secretary [of Transportation] may require a motor carrier . . . that uses motor vehicles not owned by it . . . to—(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier." The Secretary of Transportation, through the Federal Motor Carrier Safety Administration, has promulgated regulations addressing a carrier's lease of equipment from an owner-operator.

For example, 49 C.F.R. § 376.12(c)(1) (2008) states that the "lease [of equipment by the carrier] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further

provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."[6] This regulation, and others, reflects the regulatory goal of promoting highway safety. *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir. 1975) (discussing the federal regulatory goal of promoting highway safety in general, specifically including preventing carriers from avoiding safety standards by the practice of leasing equipment from non-regulated carriers).

As a result of a motor carrier's general duty for the safe operation of leased equipment, our finding today of an independent contractor relationship between Wilkinson and Palmetto is necessarily limited to the workers' compensation context. Moreover, federal law is not intended to affect a state court's determination of the relationship between a carrier and a lessor of equipment under workers' compensation laws. 49 C.F.R. § 376.12(c)(4) (2008) (providing that imposing ultimate responsibility on a carrier under federal law is not "intended to affect whether the lessor or driver

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[6] As noted, we are presented with no issue concerning the effect of federal law on the contract between Wilkinson and Palmetto. Although the contract assigns to Wilkinson the responsibility of "maintaining the equipment" and "operating the equipment in accordance with all applicable regulations," the agreement also states that Palmetto's "business of providing motor carrier transportation services to the public is subject to regulation by the Federal Government acting through the Interstate Commerce Commission and the Department of Transportation, and by various state and local governments." The contract provides in the ensuing section that Wilkinson's responsibilities are "subject in each case only to any regulatory requirements which may be placed on [Palmetto] by various governmental agencies."

provided by the lessor is an independent contractor or an employee of the authorized carrier lessee"). We find the comment to subsection (c)(4) of the federal regulation instructive:

> While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship. . . .
>
> We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact. . . . By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (1992).

The federal regulations may, therefore, not be viewed as controlling when a state court is charged with assessing whether the relationship between a motor carrier and a lessor of equipment is one of employment or independent contractor for workers'

compensation purposes. In the workers' compensation setting, we properly make the determination under our common law framework.

## III.

We reverse the court of appeals and find Wilkinson was an independent contractor for purposes of workers' compensation. As such, his estate is not entitled to benefits. We overrule the approach approved in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) that the presence of "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation." Consistent with pre-*Dawkins*' case law, the common law factors—right or exercise of control, method of payment, furnishing of equipment and right to fire—should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor. We emphasize the narrow reach of our decision today, as we analyze the employment versus independent contractor question for purposes of workers' compensation only. Having found that Wilkinson was an independent contractor for workers' compensation purposes, we need not reach the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

**REVERSED.**

**TOAL, C.J., WALLER, PLEICONES JJ., and Acting Justice James E. Moore, concur.**

## APPENDIX B

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

**Opinion No. 4179**

**Submitted October 1, 2006 –**
**Filed November 20, 2006**

| | |
|---|---|
| Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased employee), Respondent, | ) |
| v. | ) |
| Palmetto State Transp. Co., Employer, and Canal Insurance Co., Carrier, Appellants. | ) |

Appeal From Pickens County
John C. Few, Circuit Court Judge

**AFFIRMED**

Duke K. McCall, Jr., of Greenville, for Appellants.

Kathryn Williams, of Greenville, for Respondent.

**WILLIAMS, J.:** Palmetto State Transportation Company and its carrier, Canal Insurance Company (jointly referred to as Palmetto), appeal a circuit court

order affirming the Workers' Compensation Commission's (Commission) award of benefits to Scott Wilkinson's dependents. Palmetto argues the trial court erred in affirming the Commission's: (1) finding that an employer/employee relationship existed between Palmetto and Scott; (2) denial of a motion to include additional evidence; (3) finding that an occupational disability policy purchased by Scott is a collateral source; (4) denial of a motion to join Zurich American Insurance Company (Zurich), the provider of Scott's occupational disability policy, as a party defendant; and (5) denying the testimony of Gary Smith, Palmetto's expert. We affirm.

## FACTS

On May 16, 2002, while driving a transfer truck, Scott Wilkinson was involved in a fatal accident in Virginia.

Scott's spouse, Lea Ann Wilkinson, contends that during the time of the accident, Scott was an employee of Palmetto. As such, she and the couple's son are entitled to death benefits from Palmetto's workers' compensation carrier under the Workers' Compensation Act. Palmetto argues that at the time of his death, Scott was an independent contractor and not an employee; therefore, Lea Ann is not entitled to receive benefits from Palmetto. To support this argument, Palmetto contends in 1998, Scott was hired as an employee, but in May 1999 and again in 2000, the parties signed a contract in which Scott was named as an independent contractor and Palmetto as the carrier.

Palmetto further avers that even if this Court were to find an employer/employee relationship existed, Palmetto's liability should be offset by any benefits paid to Lea Ann by the occupational disability policy Scott purchased from Zurich. Lea Ann argues this policy is wholly a collateral source; therefore, Palmetto is not entitled to receive any credit from payments made by Zurich.

On February 27, 2004, the Commissioner found an employer/employee relationship existed between Scott and Palmetto at the time of his death, and Lea Ann and the couple's child were entitled to receive death benefits under Palmetto's workers' compensation policy. In addition, the Commissioner held that Scott's occupational disability policy constituted a collateral source. Thus, Palmetto was not entitled to receive credit for benefits paid from that policy, nor could Palmetto receive benefits directly from that policy.

Prior to this ruling, Palmetto filed a motion to add Zurich as an additional party referencing the occupational disability policy purchased by Scott. In addition, Palmetto filed a motion to include additional evidence. The Commissioner denied both motions.

Consequently, Palmetto appealed to the Full Commission, asserting that the Commissioner erred in denying these motions. On September 28, 2004, the Commission's Appellate Panel affirmed and adopted the Commissioner's order. On September 25, 2005, Palmetto appealed to the circuit court, which affirmed the Commission. Palmetto now appeals to this Court.

## STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, neither this Court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). Accordingly, we limit review to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. Corbin, 351 S.C. at 617, 571 S.E.2d at 95.

"Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." Lockridge, 344 S.C. at 515, 544 S.E.2d at 844. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

However, if any factual issue before the Commission involves a jurisdictional question, this Court is not bound by the Commission's findings of fact; but it can take its own view of the preponderance of the evidence on that issue. Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994).

## LAW/ANALYSIS

### A. Employer/employee relationship

Palmetto initially argues the trial court and the Commission erred in concluding that an employer/employee relationship existed between Palmetto and Scott. We disagree.

Unless an employment relationship existed between the parties at the time of the alleged injury, an award cannot be granted. Alewine v. Tobin Quarries, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Whether such a relationship exists is a jurisdictional question; therefore, this Court can take its own view of the preponderance of the evidence. S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995). However, doubts of jurisdiction are to be resolved in favor of inclusion rather than exclusion. Horton v. Baruch, 217 S.C. 48, 56, 59 S.E.2d 545, 548 (1950).

Palmetto places great weight on the agreement the parties signed in May 1999 and again in 2000, in which Scott was named as an independent contractor and Palmetto as the carrier. However, Palmetto forgets neither the descriptions of relationships as set forth in the parties' contract, nor the language in the contract declaring the parties to be that of independent

contractor/carrier is binding on this Court. Kilgore Group Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 69, 437 S.E.2d 48, 50 (1993). Rather, the determination of whether the worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles. Nelson v. Yellow Cab Co., 349 S.C. 589, 594 564 S.E.2d 110, 112-13 (2002).

The test to determine whether a claimant is an employee or an independent contractor is if "the alleged employer has the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995) (internal quotes omitted). Four factors determine the right of control.

They are: (1) direct evidence of right to or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire. Tharpe v. G.E. Moore Co., 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970). The presence of any one of the factors is sufficient proof of an employer/employee relationship; on the other hand, the absence of any one of the factors is at most mild influential evidence of contractorship. Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).

In analyzing these factors, the Court recognizes that the Workers' Compensation Act favors the inclusion of employers and employees and not their exclusion. Horton, 217 S.C. at 56, 59 S.E.2d at 548. With this introduction in mind, we now turn our attention to these four factors.

The first factor is whether direct evidence exists of the right to, or the actual exercise of, control. If an alleged employer has the right to control and sets out the manner in which the work is to be accomplished, this is direct evidence of an employer/employee relationship. Young v. Warr, 252 S.C. 179, 189-90, 165 S.E.2d 797, 802 (1969). Palmetto contends it lacked control over Scott because Scott could refuse loads and consequently worked on his own schedule. We find this argument to be without merit.

Palmetto exercised its control over Scott by requiring Scott to exclusively carry its loads. When Scott carried a load for Palmetto, he was instructed on when and where to pick up the load as well as how and when to deliver the load. Moreover, Palmetto required Scott to apply the company logo to his truck. This is sufficient evidence to prove that Palmetto not only had the right to control Scott but exercised this control. See Nelson v. Yellow Cab Co., 349 S.C. 589, 597-98, 564 S.E.2d 110, 114 (2002) (Cab company had the right of control even when the cab driver could work as little as he wanted, drove the cab in any part of the city he chose, and could set his own schedule.).

The second factor for consideration is the method of payment; this factor indicates a lack of an employer/employee relationship. Like other employed drivers, Palmetto paid Scott by the mile. However, unlike other employed drivers, Scott's rate per mile was higher, and Palmetto made no deductions for either social security or income taxes. Moreover, unlike other employed drivers, Scott had to pay various expenses such as fuel costs, service fees, and toll fees. These facts indicate that Scott was not paid like other employed drivers.

The third factor is whether Palmetto furnished Scott's equipment; this factor indicates that Scott was an employee. Although Scott purchased his own tractor, Palmetto supplied the trailer. In addition, Palmetto prohibited Scott from using the tractor to carry loads for any other company. Moreover, Scott drove a truck bearing the Palmetto logo.

Like all of Palmetto's drivers, Palmetto required Scott to carry a global positioning system (GPS) in his truck. Palmetto's safety and maintenance director, Dennis Mersereau, testified that by employing this system, Palmetto would be able to determine Scott's location anytime. These facts show that Palmetto supplied equipment to Scott.

The final factor is Palmetto's right to fire, which indicates that Scott was not an independent contractor. The unconditional power to terminate the alleged employer/employee relationship, without liability, is consistent with an employer/employee relationship. Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970). There were many circumstances in which Palmetto could fire Scott.

For example, Mr. Mersereau testified Scott was required to work exclusively for Palmetto, and if he were to transport loads for another company, he would be terminated. Mr. Mersereau also testified that even though Scott could refuse loads, if he refused too many, Scott would be terminated. Palmetto could end the relationship if it did not approve of the manner in which Scott performed his work. Additionally, Scott, like any other employee, could terminate his position with Palmetto at will.

Keeping in mind the Workers' Compensation Act favors the inclusion of employers and employees and not their exclusion, and the presence of any one of the factors is sufficient proof of an employer/employee relationship, we hold an employer/employee relationship existed between Scott and Palmetto.

**B. Motion to include additional evidence**

Palmetto next argues the Commission and the trial court erred by not allowing Palmetto to supplement the record with additional evidence. We disagree.

For additional evidence to be introduced, the moving party must establish that the additional evidence sought to be introduced "was not known to the moving party at the time of the first hearing, [or] by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to attention of the Commission immediately upon its discovery." 23A S.C. Code Ann. Regs. 67-707 (Supp. 2005). Additionally, the admission or exclusion of evidence is within the sound discretion of the Commission. Holcombe v. Dan River Mills/Woodside Div., 286 S.C 223, 225-26, 333 S.E.2d 338, 340 (Ct. App. 1985).

By motion, Palmetto sought to introduce into the record its own additional business records and an affidavit from Mr. Mersereau.

Although the hearing in this matter occurred during August 2003, the business records were created during or before May 2002. Thus, the records were in existence prior to the hearing and could have been discovered prior to the hearing with due diligence.

Likewise, Mr. Mersereau's affidavit is exclusively based on evidence that existed prior to the hearing and that could have been discovered and submitted prior to the hearing with due diligence.

Additionally, the records sought to be admitted were subpoenaed by the claimant during June 2002, and Palmetto failed to produce the records claiming that they did not exist. Based on Palmetto's failure the trial court concluded that allowing the untimely inclusion of the records would prejudice the claimant. We agree.

**C. Occupational disability policy**

Palmetto next argues the Commission and the trial court erred in holding Scott's occupational disability policy was a collateral source. We disagree.

Palmetto argues it should receive credit for any payments made to Lea Ann by the occupational disability policy Scott purchased through Zurich. Lea Ann argues the Zurich policy is a wholly collateral source; therefore, Palmetto should not be able to receive credit for payments made by Zurich.

The collateral source rule states that compensation from an independent source will not reduce the payment for which another party is liable to the injured party. Atkinson v. Orkin Extermination Co., Inc., 361 S.C. 156, 172, 604 S.E.2d 385, 393 (2004). Unfortunately, an exhaustive search of South Carolina law has failed to yield an answer to whether an occupational disability policy would be considered a collateral source. However, North Carolina courts have addressed this issue. Our courts give great weight to

North Carolina's decisions in workers' compensation cases because South Carolina adopted large portions of North Carolina's workers' compensation legislation. Munn v. Nucor Steel, Div. of Nucor Corp., 336 S.C. 28, 31, 518 S.E.2d 289, 290 (Ct. App. 1999); See Anderson v. Baptist Med. Ctr. Center, 343 S.C. 487, 496-97, 541 S.E.2d 526, 530 (2001).

North Carolina courts have ruled that an employer is entitled to receive credit only for any payments made by the *employer* to the injured employee which were not payable when made. Jenkins v. Piedmont Aviation Servs., 557 S.E.2d 104, 108-109 (N.C. App. 2001) (emphasis added). This credit is inapplicable to all other payments the employee may receive from outside sources. Id.

It is undisputed that Scott paid all of the premiums for the Zurich policy, and Palmetto did not contribute in any way to the premiums. Therefore, Palmetto should not receive any credit for payments made by Zurich.

Additionally, it flies in the face of equity to grant Palmetto a windfall benefit by allowing it to take credit against any sums Lea Ann received from other sources. This is especially true in light of the fact that Scott paid all the premiums, and Palmetto contributed in no way to the Zurich policy.

For these reasons, we hold that Palmetto is not entitled to receive credit for any payments made by Zurich.

**D. Motion to join Zurich**

Palmetto next contends the Commission and the trial court erred in not allowing it to add Zurich as a party defendant. Palmetto argues two alternative grounds for this contention. First, the Zurich policy was a workers' compensation policy, and second, Zurich would reimburse Palmetto for any benefits Palmetto paid. We disagree.

The Zurich policy states: "This Policy is not intended to provide coverage for Workers' Compensation benefits." As noted above, the Zurich policy was an outside source. As such, Palmetto is not entitled to receive any reimbursement for payments made by Zurich.

In support of its second contention, Palmetto places great weight on a clause in Zurich's policy, which would allow Palmetto to receive benefits from Zurich if Palmetto is determined liable for workers' compensation benefits[1]. However, this clause has no binding effect on this Court.

The parties are free to contract as they wish, but this freedom is not absolute. Statutory provisions that are applicable to a contract become part of that contract. Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973). If a contract

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[1] The clause states: "If a Covered person is determined by a court of law . . . to be covered under workers' compensation for a Covered Loss, any benefits for which the Covered person is eligible are payable to the person who was determined to be the Covered Person's employer. . . ."

provision contravenes an applicable statute, that provision is invalid, and the statute prevails. Id.

Under the Workers' Compensation Act, an agreement between an employee and employer for the employee to pay any portion of premiums for benefits required by the Workers' Compensation Act is invalid. See S.C. Code Ann. § 42-5-200 (1976). Additionally, no contract between an employee and employer or an employee and a third party can operate to relieve the obligations created under the Workers' Compensation Act. See S.C. Code Ann. § 42-1-610 (1976).

As already established, Scott was an employee of Palmetto at the time of his death, and any credit received by Palmetto from the Zurich policy, for which Scott alone paid the premiums would have the effect of replacing the workers' compensation benefits Palmetto is required to pay under the Workers' Compensation Act. Permitting Palmetto to recover these payments would be contrary to South Carolina law, and any provision of the Zurich policy that would allow such payment would violate the Workers' Compensation Act and therefore would be void.

The Zurich policy has no bearing on the workers' compensation claims asserted by Scott's dependents. As such, it is unnecessary to add Zurich as a party defendant because it has no interest in the matter.

**E. Testimony of Gary Smith, Palmetto's expert**

Palmetto's final argument is that the Commission and the trial court erred in not allowing the testimony of Gary Smith. We disagree.

Palmetto sought to introduce Smith's testimony to show the construction, purpose, and effect of the Zurich policy. Specifically, through Smith, Palmetto wished to show that if Palmetto is liable for workers' compensation benefits, the Zurich policy would reimburse Palmetto.

Smith's testimony was unnecessary because the Zurich policy has no effect on the workers' compensation benefits sought, and the policy provides no credit or benefits to Palmetto. Thus, the trial court did not err in excluding Smith's testimony.

## CONCLUSION

Accordingly, the circuit court's decision is

**AFFIRMED.**[2]

**GOOLSBY and BEATTY, J.J., concur.**

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[2] We decide this case without oral arguments pursuant to Rule 215, SCACR.

## APPENDIX C

**STATE OF SOUTH CAROLINA**
**COUNTY OF PICKENS**

**IN THE COURT OF COMMON PLEAS**
**THIRTEENTH JUDICIAL CIRCUIT**

**C.A. NO. 2004-CP-39-1566**
**WCC File No. 0113326**

**[Filed September 25, 2005]**

| | |
|---|---|
| Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased employee), | ) |
| Claimant/Respondent, | ) |
| vs. | ) |
| Palmetto State Transp. Co., Employer, and Canal Insurance Co., Carrier, | ) |
| Defendants/Appellants. | ) |

### ORDER

This is an appeal from the Workers' Compensation Commission. Lea Ann Wilkinson ("claimant") seeks death benefits as a result of a fatal crash her husband, Scott Wilkinson, was involved in while driving a transfer truck in Virginia on May 16, 2002. Ms.

Wilkinson maintains that her husband was a direct employee of Palmetto State Transportation Company at the time of his accident and that she and the couple's son are accordingly entitled to death benefits from Palmetto's workers' compensation carrier under the Workers' Compensation Act. Palmetto and their carrier, Canal Insurance Company (together "defendants"), contend that they are not liable for such benefits, as they allege Scott Wilkinson was an independent contractor at the time of his death and was not an employee. Defendants also contend that if Scott Wilkinson is found to be an employee of Palmetto, they are entitled to receive benefits from or to receive credit for any benefits paid to Ms. Wilkinson under an occupational disability policy her husband purchased from Zurich American Insurance Company. Ms. Wilkinson rather contends that the occupational disability policy is a wholly collateral source and that defendants are not entitled to receive benefits from that policy or take credit for benefits paid under that policy.

Prior to the hearing, defendants filed a Motion to Add Additional Party seeking to add Zurich American Insurance Company as a party based on the aforementioned occupational disability policy purchased by Scott Wilson. Zurich replied and opposed the Motion. By Order dated April 28, 2003, Commissioner Childs denied defendants' Motion to Add Additional Party. Defendants later renewed their Motion before the Hearing Commissioner, but he refused to overrule Commissioner Childs determination and also denied the Motion.

Following the hearing, defendants filed a Motion to Include Additional Evidence, which was opposed by

claimant. The Hearing Commissioner denied the Motion.

By Order dated February 27, 2004, the Hearing Commissioner found an employee/employer relationship existed between Scott Wilkinson and Palmetto at the time of death and that his dependents, his wife and only child, are entitled to death benefits under Palmetto's workers' compensation policy. As an alternative ground, the Commissioner found that a statutory employee/employer relationship existed between the parties due to the fact that Palmetto contracted with Scott Wilkinson to perform work which is a part of its trade, business, or occupation. He also found that Scott Wilkinson was covered under Palmetto's workers' compensation policy due the deduction of a workers' compensation premium from his pay in the week prior to his death. Finally, the Commissioner found that the Occupational Accident policy Scott Wilkinson purchased from Zurich American Insurance Company is a collateral source and that defendants are not entitled to receive credit for benefits paid under that policy or to receive benefits directly from that policy.

Defendants appealed to the Full Commission contending the Commissioner erred in finding Scott Wilkinson was an employee of Palmetto at that time of his death, in finding the collateral source rule prevents Zurich's policy from providing benefits to defendants, in denying defendants' Motion to Include Additional Evidence, and in denying defendants' motion to add Zurich as a party to the claim. However, by Order dated September 28, 2004, the Commission's Appellate Panel affirmed and adopted the Hearing Commissioner's Order.

Defendants now appeal to this Court.

## SCOPE OF REVIEW

The Circuit Court, sitting as an Appellate Court in workers' compensation appeals, may only overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, __, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C. Code Ann. § 1-23-380 (2001). The Lark court went on to explain that

> "[s]ubstantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. . . . [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.E.2d at 306-07. Furthermore, a court "may reverse where the decision is affected by an error of law." Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996). However, when the Commission's jurisdiction is at issue, the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction is dependent and may substitute its own judgment for that of the Commission as to the weight of the evidence on

questions of fact. Wilson v. Georgetown Co., 316 S.C. 92, 447 S.E.2d 841 (1994).

## ANALYSIS

Defendants appeal to this Court contending that the Commission erred in finding that an employee/employer relationship existed between the parties, in finding that the Occupational Accident policy is a collateral source for which defendants are not entitled to receive credit, in excluding the testimony of Gary Smith and denying the motion for inclusion of additional evidence, and in denying the motion to add Zurich as an additional party. Because I find no error in the Commission's decisions and find all decisions to be supported by substantial evidence in the record, I affirm the Order of the Commission on all issues.

**Employee/employer relationship.** Defendants first contend the Commission erred in finding that an employee/employer relationship existed between Scott Wilkinson and Palmetto contending that the relationship does not satisfy the four factors of the control test. I disagree.

The existence of an employment relationship hinges on "the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Spivey v. D.G. Constr. Co., 321 S.C. 19, __, 467 S.E.2d 117, 119 (Ct.App.1996). In determining which party exercises the right to control, our courts have generally evaluated four factors: (1) direct evidence of the right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. Id.;

Tharpe v. G.E. Moore Co., 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970). "[A]ny single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). Furthermore, when making this analysis, it should be remembered that "South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." Spivey, 467 S.E.2d at 119. Of course, titles or descriptions of the relationship used by the parties or language in a contract declaring the relationship to be that of an employer/independent contractor is not dispositive of the issue. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002).

Concerning the right or exercise of control, our courts have held that "[i]t is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Chavis v. Watkins, 256 S.C. 30, __, 180 S.E.2d 648, 649 (1971). An employer's determination of the hours worked and of the manner in which the work is to be done and the required use of uniforms is direct evidence of the right or exercise of control. Nelson; South Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 549, 459 S.E.2d 302, 303 (1995); Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct.App.1987). Requiring a worker to work exclusively for an employer is direct evidence of the right or exercise of control by that employer. Crim. The fact that a driver

can choose when to drive is not dispositive if the employer controls the method and means of his driving when he chooses to drive. Nelson.

Here, Ms. Wilkinson testified that her husband went to work every day when Palmetto told him to do so. (tr. p. 17, lines 1-4) Dennis Mersereau, Palmetto's safety and human resources director, testified that Palmetto told Scott Wilkinson when he worked, told him when and where to pick up and deliver loads, and required him to use the Palmetto logo on his truck, which is substantially similar to requiring uniforms. (tr. p. 75, line 23-p. 76, line 4; p. 80, line 24-p. 81, line 17) In addition, Palmetto required that Scott Wilkinson, and all their other drivers, carry global positioning equipment in his truck, and Mr. Mersereau testified that this equipment could be used to determine where Wilkinson was at all times. (tr. p. 21, line 11-p. 22, line 2; p. 82, line 10-p. 83, line 14; p. 94, line 25-p. 95, line 15) Furthermore, Ms. Wilkinson testified and Mr. Mersereau confirmed that Scott Wilkinson was required to work solely for Palmetto and would be terminated if he transported loads for any other company. (tr. p. 17, lines 1-10; p. 22, lines 3-8; p. 71, lines 3-8; p. 76, line 5-22; p. 78, line 12-p.82, line 5) While the evidence shows that Scott Wilkinson could technically refuse loads that Palmetto offered to him, Mr. Mersereau testified that he could be fired if he refused too many loads and that once he accepted a load, he was required to run the load in accordance with Palmetto's instructions. (p. 76, line 23-p. 79, line 10; p. 80, line 9-p. 82, line 5)

Concerning the right to fire, our courts have held that the most important factor to consider with regard to the existence of an employment relationship is the

right to fire, as "[t]he power to fire, it is often said, is the power to control . . . [and] [t]he absolute right to terminate the relationship without liability is not consistent with the concept of independent contract." Tharpe, 174 S.E.2d at 399. Here, Mr. Mersereau testified that there were many situations in which Palmetto could terminate Scott Wilkinson's employment. For instance, he could be fired if he was found to be working for or running loads for another company, if he consistently refused loads, or if the company did not like the way he performed some task. (tr. p. 76, line 5-p. 80, line 7; p. 81, line 18-p. 83, line 14) He also admitted that there was no penalty for termination or breach of the contractual agreement. (tr. p. 71, line 3-p. 72, line 9) In fact, Mersereau admitted that Scott Wilkinson's relationship with Palmetto remained almost identical to that of the directly-employed drivers, in that he could terminate the contract at any time just as a direct employee could quit at any time, Palmetto could terminate the contract at any time just as a direct employee could quit at any time, and both Wilkinson and other direct employees risked termination if they refused to carry an offered load. (tr. p. 76, line 5-p. 80, line 7; p. 94, lines 9-24)

Concerning then method of payment, Ms. Wilkinson testified that her husband was paid by the mile before he signed the separate agreement in May 1999 and that he continued to be paid by the mile after he signed the agreement. While he was paid a higher mileage rate under the agreement, he had to pay various expenses, such as fuel costs, out of his own pocket, and the net result was virtually identical to his pay prior to the agreement. (Tr. p. 14, lines 13-18; p. 18, lines 6-16; p. 62, line 12-p. 63, line 6; p. 85, line

22-p. 87, line 5; p. 88, line 16-p. 89, line 2; p. 101, line 16-p. 108, line 9; Claimant's Exhibits #2, 3; Defendants' Exhibit #3) In addition, Wilkinson was allowed to continue to purchase medical insurance under the company's plan, just as he did before signing the agreement. (tr. p. 97, line 25-p. 99, line 8)

Concerning the furnishing of equipment, while Scott Wilkinson purchased and drove his own tractor, Palmetto leased it from him under the agreement and prevented him from using it to carry loads for any other company. Though Wilkinson paid for his fuel and licenses out of his own pocket, Palmetto supplied the trailer that he pulled and the logos and global positioning system on his truck. While Wilkinson was required to have his own Department of Transportation number, he used Palmetto's Department of Transportation number while carrying their loads and was not allowed to carry loads for anyone else. (tr. p. 62, lines 19-p. 63, line 6; p. 65, line 12-p. 66, line 6; p. 75, line 23-p. 76, line 4; p. 82, lines 6-24)

The above evidence clearly shows that an employee/employer relationship existed between Palmetto aud Scott Wilkinson at the time of his death. Despite the parties designation of Wilkinson as an independent contractor, Palmetto retained the right to control Wilkinson and did in fact exercise control over Wilkinson, as primarily evidenced by their refusal to allow him to work for any other company while working for Palmetto. Palmetto further retained the right to terminate Wilkinson at any time, paid him in much the same manner as they paid him prior to the separate agreement, and provided a substantial part

of the equipment he needed to perform his job. The Commission's Order must be affirmed on this issue.

**Occupational Accident policy as collateral source.** Defendants next contend that the Commission erred in finding that the Occupational Accident policy purchased by Scott Wilkinson is a collateral source and that defendants are not entitled to take advantage of its existence in any way. I again disagree.

Our Supreme Court has specifically held that the Workers' Compensation Act does not authorize an employer or carrier to not pay benefits under the Act or to offset benefits owed under the Act because an injured worker received sums from a collateral source. McLeod v. South Carolina Ins. Co., 272 S.C. 254, 251 S.E.2d 193 (1979). See also Johnston v. Aiken Auto parts, 311 S.C. 285, 428 S.E.2d 737 (Ct.App.1993)(tortfeasor has no right to mitigation of damages because of payments or compensation received by the injured person from a source wholly independent of the wrongdoer; law does not differentiate between the nature of the benefit, so long as it did not come from the defendant); Estate of Ratenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989)(collateral source rule prevents defendant from offsetting its liability for insurance proceeds received by injured party as a result of a premium paid by the injured party).

Though South Carolina's courts have not considered the effect of occupational disability policy like the one found here, the North Carolina Supreme Court has held that an employer and its workers' compensation insurance carrier are not entitled to credit for payments made under such a policy, even if

the employer paid the policy premiums. Ashe v. Barnes, 121 S.E.2d 549 (N.C. 1961). While North Carolina has since statutorily provided that the employer may receive credit for non-workers' compensation disability payments funded by an employer, its legislature and courts have expressly limited the credit to employer-funded benefits. N.C. Gen. Stat. § 97-42 (2003); Jenkins v. Piedmont Aviation Serv., 557 S.E.2d 104 (N.C. Ct.App. 2001). It follows then that an employer cannot, under any circumstances, take credit for benefits paid under a separate insurance policy for which the employee alone paid the premiums. Other jurisdictions have reached this conclusion. See Griffin v. North Dakota Workers' Comp. v. Bureau, 466 N.W.2d 148 (N.D. 1991); Jewel Tea Co. v. Florida Indus. Comm'n, 235 So.2d 289 (Fla. 1970).

Here, it is undisputed that Scott Wilkinson paid all of the premiums for the occupational disability policy he obtained from Zurich, and Palmetto did not contribute to the policy or premiums in any way. (tr. p. 20, lines 4-15; p. 67, lines 14-16) Therefore, Palmetto is clearly not entitled to receive any credit for the occupational disability policy in this claim.

Defendants argument that the collateral source rule does not apply because defendants cannot be considered a "tortfeasor" and because the workers' compensation system is a "no-fault" system lacks merit, as our courts have clearly held that the principle applies to the workers' compensation system. See McLeod.

Furthermore, since Scott Wilkinson has been shown to have been an employee of Palmetto at the

time of his death, any credit or benefits received by Palmetto from the occupational disability policy funded by Scott Wilkinson would, in effect, be replacing workers' compensation benefits Palmetto is statutorily required to provide to his dependents. If that were to occur, Scott Wilkinson would, in effect, have funded his own workers' compensation premiums, and such a result is contrary to South Carolina law. See S.C. Code Ann. § 42-5-200 (2004)(agreement by employee to pay any portion of premium for benefits required b the Act is not valid, and employer who makes a deduction for such purpose from employee's pay shall be guilty of misdemeanor); S.C. Code Ann. § 42-1-610 (2004)(no contract, agreement, rule, regulation or other device shall in any manner operate to relieve employer of any obligation created under the Act). See also Jewel Tea Co. v. Florida Indus. Comm'n, 235 So.2d 289 (Fla. 1970)(based on statute identical to § 42-5-200, employer not allowed to credit or receipt of benefits from employee-funded insurance policy); Ashe v. Barnes, 121 S.E.2d 549 (N.C. 1961)(based in part on statute identical to § 42-1-610, employer not allowed to credit or receipt of benefits from employee-funded insurance policy).

The Commission clearly committed no error in finding that the Occupational Accident policy Scott Wilkinson purchased from Zurich is a collateral source and that defendants are not entitled to receive credit for benefits paid under that policy or to receive benefits directly from that policy. Because these findings are supported by substantial evidence and are not affected by any error of law, the Commission's Order must be affirmed on this issue.

**Denial of Motion to Include Additional Evidence.** Defendants next contend that the Commission erred in denying their Motion to Include Additional E idence and thereby denied them due process, I disagree.

Under the Commission's rule, the moving party must establish that the new evidence is of the same nature and character required for granting a new trial and show:

> (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; **and**
>
> (2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

S.C. Code Reg. § 67-707 (C)(2004)(emphasis added). See also Ancrum v. Low Country Steaks, 317 S.C. 188, 452 S.E.2d 609 (Ct.App.1995); Bettis v. Busbee, 283 S.C. 502, 323 S.E.2d 536 (Ct.App.1984). Furthermore, the admission or exclusion of evidence is a matter within the sound discretion of the Commission. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 333 S.E.2d 338 (Ct.App.1985).

Here, the additional evidence defendants sought to have admitted into the record following the hearing consists of business records from Palmetto, which are purported to be records of payments made to Scott or Lea Ann Wilkinson, and additional testimony in the form of an affidavit from a representative of Palmetto, Dennis Mersereau. On their face, the purported payment records indicate that they were created on or before May 23, 2002, and thus, they were in existence prior to the hearing in this matter on August 28, 2003 and could have been discovered and submitted prior to the hearing with due diligence. Similarly, Mr. Mersereau's affidavit is based solely on evidence that was in existence prior to the hearing that could have been discovered and submitted prior to the hearing with due diligence.

Furthermore, the record shows that claimant subpoenaed records from defendants on June 21, 2002, including records of payments made in the 52 weeks prior to and subsequent to the injury by accident. While defendants responded, additional correspondence from claimant indicates that they included no records of payments made. Defendants then provided some pay records, but the records which were the subject of defendants' Motion were not included. Defendants represented to claimant through their failure to produce these records that the records did not exist, and claimant would be prejudiced by their untimely inclusion into the record, as she has not had the opportunity to investigate the validity of the records or to elicit testimony from the creators of the documents as to their validity and effect.

Defendants failed to provide the records in question in response to valid discovery requests and failed to

comply with the Commission's regulations concerning the timely submission of documentary evidence prior to the hearing. Therefore, the Commission did not abuse its discretion is refusing to accept the records into evidence, and it's decision is affirmed.

**Denial of Motion to Join Zurich as a party and the testimony of Gary Smith**. Defendants finally contend that the Commission erred in denying their Motion to add Zurich, the company which provided Scott Wilkinson's Occupational Accident policy, as a party and erred in refusing to allow a proffer of the testimony of Gary Smith. I disagree.

On its face, the Zurich policy clearly states that it is not a workers' compensation policy and provides no benefits as required by workers' compensation law. Furthermore, the Zurich policy is a wholly collateral source from which defendants may not receive benefits and for which they may not receive credit for benefits paid, as such receipt or credit would be contrary to law. See McLeod; S.C. Code Ann. §§ 42-1-610, 42-5-200 (2004). While the Zurich policy contains a clause that would appear to require its benefits to be paid to defendants in the event defendants are determined to be liable for workers' compensation benefits, this is a private policy paid for and owned by Scott Wilkinson and such provision would in effect have Wilkinson paying his own workers' compensation premium in violation of section 42-5-200. Therefore, the clause is not controlling. Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 214 S.E.2d 818 (1975)(to the extent a policy provision conflicts with an applicable statutory provision, the statute prevails).

Furthermore, the Court takes judicial notice of the fact that the parties herein and Zurich are currently engaged in a separate civil action arising from the Occupational Accident policy. Whether Zurich should have been added as a party has no bearing on the question of whether Scott Wilkinson was an employee of Palmetto, and in the absence of any statute clearly depriving the Circuit Court of jurisdiction to construe the Occupational Accident policy and determine the parties rights under its terms, the Commission committed no error in refusing to join Zurich as a party in the workers' compensation claim.

As to the issue of the proffer of the testimony of Gary Smith, defendants argument is curious, as the record clearly shows that the Hearing Commissioner did allow this testimony into the record as proffer. (tr. p. 35, line 25-p. 61, line 3) However, in light of the above, it is clear that such testimony was not needed as the Zurich policy has no effect here and provides no relevant benefits or offset of benefits.

For the foregoing reasons, the Commission's Order in this matter is affirmed on all issues.

**IT IS SO ORDERED.**

/s/_____
John C. Few
Judge, Thirteenth Judicial Circuit

Dated: 9/25/05

## APPENDIX D

## APPELLATE PANEL DECISION AND ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

**W.C. FILE NO. 0208317**

**[September 28, 2004]**

LEA ANN WILKINSON (surviving spouse) for, SCOTT R. WILKINSON (deceased),

EMPLOYEE,
CLAIMANT,

-VS-

PALMETTO STATE TRANSPORTATION CO.,

EMPLOYER,

AND

CANAL, INSURANCE CO.,

INSURER,
DEFENDANT,

**AFFIRMED**

Appellate Panel Review held in Columbia, South Carolina, on July 28, 2004, timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed

September 28, 2004

APPEARANCES:

Respondent/Claimant represented by
LAW OFFICE OF KATHRYN WILLIAMS with
Kathryn Williams appearing.

Appellant/Defendant represented by
LEATHERWOOD, WALKER, TODD & MANN
with Duke K. McCall, Jr. appearing.

## STATEMENT OF CASE

The parties were heard by Commissioner G. Bryan Lyndon on August 28, 2003, in Pickens, South Carolina. As a result of said hearing, the single Commissioner issued an Order dated February 27, 2004, from which the Appellant takes this appeal.

Within the statutory period, counsel for the Defendant filed an Application for Review in the case setting forth their assignments of error, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on July 28, 2004.

Pursuant to S.C. Code Ann. 42-17-50 (1985), we, the Appellate Panel, have reviewed the Award and weighed the evidence as presented at the initial

hearing. We have also considered all issues raised in the briefs of the Appellant(s) and Respondent(s).

After careful review in the instant case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined that all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated. We find that such Findings of Fact and Conclusions of Law are hereby included in this Order by reference, and by such reference the requirements of Baldwin v. James River Corporation, 304 SC 485, 405 SE2d 4, as well as Sections 42-17-40 and 1-23-350 of the South Carolina Code of Laws have been met.[1] Accordingly, the Findings of Fact and Conclusions of Law set forth in the Single Commissioner's Order shall become, and hereby are, the law of the case and, therefore, the Order is sustained in its entirety. The Hearing Commissioner's decision is incorporated by reference as if set forth verbatim herein.

## ORDER

The Order of the Single Commissioner from which this appeal has been taken is hereby **affirmed** by the Panel and same shall constitute the final Decision and Order of the South Carolina Workers' Compensation Commission.[2]

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[1] See also D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW at 5-109 (1983).

[2] It should be noted that the findings of fact and conclusion of law as contained in the single commissioner=s order are specifically referenced and included in toto in the Aorder@ portion of this decision so as to comply with the requirements of Baldwin v.

S.C. WORKERS' COMPENSATION
COMMISSION

/s/
Lisa D. Chavis, Commissioner
For the Appellate Panel

CONCUR: /s/ J. Michelle Childs

/s/ GBL

* * *

*[Certificate of Service omitted in printing of this appendix]*

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James River Corporation, 304 SC 485, 405 SE 2d 4, as well as the Administrative Procedures Act of the State of South Carolina. In the interest of brevity they have not been repeated in the body of this order.

## APPENDIX E

## ORDER
## of the
## SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

**File No.: 0208317**

**[Filed February 27, 2004]**

| | |
|---|---|
| Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased), | ) |
| Claimant, | ) |
| vs. | ) |
| Palmetto State Transportation Co, | ) |
| Employer, and | ) |
| Canal Insurance Co., | ) |
| Carrier, Defendants. | ) |

Hearing: Held in Pickens, South Carolina on August 28, 2003.

Appearances: Kathryn Williams, Esq. of Kathryn Williams, P.A. for claimant.

Duke K. McCall, Jr., Esq. of Leatherwood, Walker, Todd & Mann, P.C. for defendants.

Purpose: To determine issues as set forth on the Forms 52 and 53.

Decision & Order: G. Bryan Lyndon, Commissioner

Filed: February 27, 2004

**APA SUBMISSIONS**

By claimant:

APA #1 Accident report, Commonwealth of Virginia, Department of State Police, dated 6/9/99, consisting of 2 pages (pages 1-2).

APA #2 Report of Chief Medical Examiner, Commonwealth of Virginia, Department of Health, dated 8/6/02, consisting of 8 pages (pages 3-10).

APA #3 Certificate of Death, Commonwealth of Virginia, Department of Health, dated 5/22/02, consisting of 1 page (page 11).

APA #4 License and Certificate of Marriage, State of South Carolina, dated 2/27/93, consisting of 1 page (page 12).

APA #5 Certificate of Live Birth, State of South Carolina, Department of Health &

Environmental Control, dated 12/30/99, consisting of 1 page (page 13).

APA #6 Funeral Arrangement Agreement and Receipt, Mackey Mortuary, dated 5/20/02, consisting of 3 pages (pages 14-16).

APA #7 Settlement sheet for check dated 5/10/02, consisting of 3 pages (pages 17-19).

APA #8 Employment records related to provision of health insurance, dated 2/11/99 through 3/15/02, consisting of 8 pages (page 20-27).

APA #9 Current Benefits Employee Summary, dated 5/9/02, consisting of 1 page (page 28).

APA #10 Correspondence from Carolina Insurance Consultants, Inc. to Palmetto State Transportation Co., with attachments, dated 5/16/02, consisting of 7 pages (pages 29-35).

APA #11 Equipment-GPS history, dated 5/17/02, consisting of 5 pages (pages 36-40).

By defendants:

APA #1 Letters from Gary Smith, Division of Coverage & Compliance, Workers' Compensation Commission to Duke K. McCall, Jr. and Thomas P. Bellinger, dated 10/15/02, consisting of 7 pages (pages 1-6).

APA #2 Excluded by Commissioner, but accepted into the record as proffer (pages 7-44).

APA #3 Equipment Lease Contract #070300 signed by Scott Wilkinson and Palmetto State Transportation Co., dated 7/3/00, consisting of 8 pages (pages 45-52).

APA #4 Cab car registration for Scott Wilkinson, South Carolina Department of Public Safety, dated 4/3/00, consisting of 1 page (page 53).

APA #5 Excluded by Commissioner, but accepted into the record as proffer (pages 54-68).

APA #6 Check register of Palmetto State Transportation Co. for check to Scott Wilkinson, dated 1/4/02 through 5/24/02, consisting of 1 page (page 69).

APA #7 Investigative reports of Steven K. Byce of Legal Investigations, dated 7/21/03, consisting of 8 pages (pages 70-77).

**EXHIBITS**

By claimant:

#1 Settlement sheet for check dated 5/17/02, consisting of 2 pages.

#2 2000 Federal tax return for Scott & Lea Ann Wilkinson.

#3 2001 Federal tax return for Scott & Lea Ann Wilkinson.

By defendants:

#1 Occupational Accident Insurance Policy issued by Zurich American Insurance Company (also proffered, see defendants' APA #2 above).

#2 (proffer, see defendants' ADA #5 above)

#3 1999 Federal tax return for Scott & Lea Ann Wilkinson.

#4 1999 Equipment Lease Contract signed by Scott Wilkinson and Palmetto State Transportation Co.

## STIPULATIONS

Counsel for all parties stipulated at the hearing to the following issues:

1. The purpose of the hearing is to determine the issues set forth in the hearing notice, issues pled in the Forms 52 and 53, and any other issues which may timely come before the Commissioner.

2. Notice of the hearing was timely and properly served upon all parties of interest.

3. Venue, set in Pickens County, is proper.

4. Claimant, the deceased worker's spouse, seeks death benefits under the South Carolina Workers' Compensation Act based on accidental injury resulting in the death of her husband on

May 16, 2002 while he was allegedly employed by Palmetto State Transportation Company and, therefore, the South Carolina Workers' Compensation Commission has jurisdiction of the case.

5. The Commission's file and the Hearing Commissioner's notes are a part of the record of this case, with the exception of self-serving declarations and unstipulated medical reports.

6. Scott Wilkinson was a direct employee of Palmetto State Transportation Company when he began working for the company as a truck-driver in January 1998.

7. Scott Wilkinson earned profit of $51,087.00 on income of $146,074.00 in 2001 entitling him to a compensation rate of $549.42, the maximum compensation rate for injury by accident occurring in 2002.

**DECEASED'S BIOGRAPHICAL INFORMATION**

Age: 35

Sex: Male

Work History: Before starting work with Palmetto in January of 1998, claimant was a long-haul truck driver for Southeast Motor Freight and Corporate Express

## STATEMENT OF THE CASE

Lea Ann Wilkinson, the deceased worker's spouse ("claimant'), seeks death benefits as a result of a fatal motor vehicle accident her husband was involved in on May 16, 2002 while driving a truck for Palmetto State Transportation Company. She contends that she and her minor son, Tyler, are entitled to benefits as her husband's sole dependents. She also seeks a finding that an occupational accident policy her husband purchased from Zurich American Insurance Company is a collateral source and that defendants are not entitled to receive credit for benefits paid under that policy. Claimant presented a motion for the Commission to appoint her guardian *ad litem* for son, and the motion was granted.

Palmetto and its workers' compensation carrier, Canal Insurance Company (together "defendants"), deny that claimant is entitled to benefits because they contend claimant's husband was not an employee but was an independent contractor. However, if the claim is found compensable, defendants seek credit for benefits paid to claimant under the Zurich occupational accident policy, contending that the policy is not a collateral source since it was required under her husband's contract with Palmetto and Palmetto agreed to forego a payroll surcharge for workers' compensation insurance based on the existence of that policy.

Defendants also renewed their motion to add Zurich as a party to this claim; however, the Commissioner denied the motion on the basis of Commissioner Childs previous consideration and denial of the same motion by Order dated April 28,

2003. Based on the Commissioner's ruling on this issue, claimant objected to defendants' ADA submissions #2 and 5 and to one of defendants' listed witnesses. The evidence, including the testimony of defendants' witness, was excluded, but presented into the record as proffer.

## EVIDENCE OF THE CASE

Claimant testified that she is Scott Wilkinson's widow. She stated that she married Scott in February 1993 and that they had one child, a son named Tyler, in December 1999. Claimant testified that her husband had not been previously married and had no other children. While his parents and two siblings are still living, claimant stated that her husband provided no financial support to them or anyone other than her and Tyler. Scott Wilkinson was 35 years old at the time of his death.

Claimant testified that her husband became a direct employee of Palmetto in 1997 or 1998. His work involved long-distance truck driving, and he was paid according to the number of miles he drove. In addition, he received medical insurance benefits for their family. Then in the summer of 1999, her husband personally purchased his truck and signed a separate agreement with Palmetto leasing the vehicle back to the company. However, claimant testified that to her knowledge and observation, nothing about her husband's work changed except the manner in which he was paid. She stated that he still went to work for Palmetto every day when he was told to do so, still carried general cargo that Palmetto assigned to him, was still not allowed to carry loads for any other company, and was still subject to termination by Palmetto. In addition,

Palmetto required that he carry global positioning satellite ("GPS") equipment in his tractor that allowed Palmetto to know where he was at all times. Claimant testified that she prepared her and her husband's tax returns every year and knew what and how he was paid. She stated that after signing the separate agreement, he continued to be paid for his services to the company based on the number of miles he drove and continued to receive his pay by direct deposit. The only difference was that after the agreement her husband paid his own fuel expenses from the pay he received.

Claimant also testified that a weekly deduction was taken from her husband's check for a workers' compensation premium after the separate agreement was signed until approximately July 2001. In July 2001, her husband purchased an occupational accident policy from Zurich. She stated that he personally paid the premium for this policy, and Palmetto never paid anything for the policy. Claimant testified that the last settlement sheet her husband received before his death setting out his pay and expenses for the May 10, 2002 pay period reflects a deduction for a workers' compensation premium and that this premium deduction was never refunded.

Dennis Mersereau, Palmetto's safety and maintenance director, testified that Palmetto is a trucking company and is in the business of hauling goods over the road by truck. At the time of the hearing, the company employed some 74 company drivers and seven owner-operators. He stated that loads are assigned to the company drivers first and that owner-operators are given the overflow work, but he admitted that both company drivers and

owner-operators are performing a necessary part of Palmetto's business.

Mr. Mersereau stated that the deceased was a direct employee of the company when he started working for Palmetto in 1998 but that he became an owner-operator in May 1999. He testified that, as a direct employee of Palmetto to May 1999, Scott Wilkinson was required to drive a truck with the company logo attached, to pick up loads where Palmetto told him to do so, and to deliver loads according to Palmetto's instructions. He was not allowed to use the truck that was provided to him to haul loads for another company. Palmetto controlled when he worked and had the right to terminate his employment at any time. As a direct employee, if Scott Wilkinson refused a load that was assigned to him, he would be terminated.

However, Mr. Mersereau also testified that after the deceased became an owner-operator, he still continued to drive a truck with the Palmetto company logo on it. He was still required to haul loads exclusively for Palmetto, and if he ran a job for someone else, even on his own time, his relationship with Palmetto could be terminated. While Scott Wilkinson could refuse a particular load that Palmetto offered to him, his relationship with Palmetto could be terminated if he consistently refused loads. When he took a load that Palmetto offered to him, he had to run it in accordance with Palmetto's instructions. Palmetto continued to tell him what to do and where to go, and they required him to carry GPS equipment in his tractor with which the company could determine where he was at any time. Mr. Mersereau testified that the deceased could have terminated his

relationship with Palmetto at any time, just as he could have quit at any time as a direct employee, and Palmetto could terminate the relationship at any time, just as they could fire a direct employee at any time. In fact, Mr. Mersereau testified that Palmetto could terminate their contract with Scott Wilkinson at any time if they did not like the way that he did something or the way that he worked.

Mr. Mersereau testified that Palmetto does not require owner-operators to carry occupational disability policies, but does require that they have workers' compensation coverage. If an owner-operator does not have their own workers' compensation coverage, Palmetto extends coverage under its own workers' compensation policy and deducts a weekly amount from payroll to cover the related premium. Mr. Mersereau testified that a workers' compensation premium was deducted from the deceased's pay until he disclosed that he had purchased an occupational accident policy from Zurich. He stated that if an owner-operator produces a policy like the Zurich policy, Palmetto treats that as workers' compensation coverage and ceases to make the premium deductions from payroll. Mr. Mersereau testified that he did not personally accept the Zurich policy from the deceased and had no personal knowledge that the policy specifically states that it is not a workers' compensation policy and is not intended to satisfy workers' compensation laws. He further admitted that Scott Wilkinson paid all premiums for the Zurich occupational accident policy without contribution from Palmetto.

Mr. Mersereau testified that direct employees of Palmetto are provided certain fringe benefits, such as

health insurance for employees and their families, and that such fringe benefits are not offered to owner-operators. However, he admitted that Palmetto did continue to offer such benefits to Scott Wilkinson and one other direct employee who became owner-operators.

Mr. Mersereau acknowledged that the settlement sheet for the pay period dated May 10, 2002 is a record of weekly payments and deductions generated by Palmetto. He testified that the deduction for workers' compensation premium made on that date is simply a mistake and would be corrected on a subsequent settlement sheet. However, when shown a copy of the subsequent and final settlement sheet, Mr. Mersereau admitted that a correction did not appear.

Based on all the evidence presented, including my observations of the witnesses, I make the following findings:

## FINDINGS OF FACT

1. Scott Wilkinson died as a result of injuries sustained in a motor vehicle collision in Mecklenburg County, Virginia. This finding is based on all the evidence, including claimant's testimony and police and medical records submitted into the record.

2. At the time of his death, Scott Wilkinson was hauling goods for Palmetto State Transportation Company. This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

3. Palmetto State Transportation Company is a trucking company and is in the business of hauling goods over the road by truck. This finding is based on all the evidence, including the testimony of Dennis Mersereau.

4. Palmetto State Transportation Company has 74 drivers which the company considers to be direct employees and seven other drivers which the company considers to be owner-operators. This finding is based on all the evidence, including the testimony of Dennis Mersereau.

5. All drivers, whether considered by Palmetto to be direct employees or owner-operators, are performing a necessary part of Palmetto's business. This finding is based on all the evidence, including the testimony of Dennis Mersereau.

6. At the time of his death, an employee/employer relationship existed between Scott Wilkinson and Palmetto State Transportation Company. This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

    a. Scott Wilkinson was a direct employee of Palmetto when he was first hired in January 1998. This finding is based on the parties' stipulation and all the evidence, including claimant's testimony and the testimony of Dennis Mersereau.

b. In May 1999, Scott Wilkinson personally purchased his tractor and signed an Equipment Lease Contract with Palmetto (renewed in July 2000), after which Palmetto considered him to be an owner-operator and not an employee. This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

c. Despite the May 1999 agreement and Scott Wilkinson's subsequent designation as a non-employee owner-operator, Palmetto continued to reserve the right to control and did in fact control Scott Wilkinson's work.

1) Before and after the May 1999 agreement, Palmetto scheduled when Scott Wilkinson worked.

2) While Scott Wilkinson could refuse loads that Palmetto offered to him after the May 1999 agreement, if he chose to accept a load, he was required to haul and deliver the load in accordance with Palmetto's instructions, just as he was prior to the May 1999 agreement.

3) Before and after the May 1999 agreement, Palmetto required Scott Wilkinson to drive a truck bearing the Palmetto logo.

4) Before and after the May 1999 agreement, Palmetto required Scott

Wilkinson to carry global positioning satellite equipment in his tractor that could be used to determine his location at any time.

5) Before and after the May 1999 agreement, Palmetto required Scott Wilkinson to work solely for Palmetto.

This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

d. Despite the May 1999 agreement and Scott Wilkinson's subsequent designation as non-employee owner-operator, Palmetto continued to reserve the right to terminate Scott Wilkinson at any time without penalty and he retained the right to quit at any time without penalty.

1) Before and after the May 1999 agreement, Palmetto reserved the right to terminate Scott Wilkinson if he was found to be working for or transporting loads for any other company.

2) Before and after the May 1999 agreement, Palmetto reserved the right to terminate Scott Wilkinson if he consistently refused loads that were offered to him.

3) Before and after the May 1999 agreement, Palmetto reserved the right

to terminate Scott Wilkinson if the company did not like the way he performed some task.

This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

e. Despite the May 1999 agreement and Scott Wilkinson's subsequent designation as a non-employee owner-operator, Palmetto continued to pay him by much the same method as they paid him before the agreement.

1) Before and after the May 1999 agreement, Palmetto paid Scott Wilkinson every week.

2) Before and after the May 1999 agreement, Palmetto paid Scott Wilkinson according to the number of miles he drove for the company.

3) While Palmetto paid Scott Wilkinson a higher mileage rate after the May 1999 agreement was signed, the net result was virtually identical to his pay prior to the agreement since he had to pay various expenses, such as fuel costs and repairs, out of his own pocket.

4) Before and after the May 1999 agreement, Palmetto provided Scott

Wilkinson and his wife and child with group health insurance benefits.

This finding is based on all the evidence, including claimant's testimony; the testimony of Dennis Mersereau; and the pay, tax, and other records submitted into the record.

f. Despite the May 1999 agreement and Scott Wilkinson's subsequent designation as a non-employee owner-operator, Palmetto continued to provide to Scott Wilkinson the equipment he needed to perform his work.

1) While Palmetto provided the tractor Scott Wilkinson drove before the May 1999 agreement and he purchased and drove his own tractor after the May 1999 agreement, Palmetto leased the vehicle from him under the agreement and prevented him from using it to haul loads for any other company.

2) Before and after the May 1999 agreement, Palmetto supplied Scott Wilkinson with the trailer that he used to haul goods.

3) Before and after the May 1999 agreement, Palmetto supplied Scott Wilkinson with company logos and required that they be attached to his tractor at all times.

4) Before and after the May 1999 agreement, Palmetto supplied Scott Wilkinson with global positioning system equipment and required that the equipment be used at all times.

This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

7. Palmetto State Transportation Company deducted a workers' compensation premium from Scott Wilkinson's pay in the week prior to his death, and while this premium deduction may have been a mistake on Palmetto's pan, there is no evidence that the mistake was ever corrected. This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

8. Scott Wilkinson sustained injury by accident arising out of and in the course of his employment with Palmetto State Transportation Company on May 16, 2002 resulting in his death. This finding is based on all the evidence, including claimant's testimony and police and medical records submitted into the record.

9. Scott Wilkinson was married to claimant, Lea Ann Wilkinson, at the time of his death, and he had never been married to anyone else. This finding is based on all the evidence, including

claimant's testimony and reports and records submitted into the record.

10. Scott Wilkinson had one child, Tyler Wilkinson, at the time of his death, and he never fathered any other children. This finding is based on all the evidence, including claimant's testimony and reports and records submitted into the record.

11. Tyler Wilkinson is a minor under the age of eighteen. This finding is based on all the evidence, including claimant's testimony and records submitted into the record.

12. Scott Wilkinson's parents and two siblings are still living, but none of them were dependent on him at the time of his death. This finding is based on all the evidence, including claimant's testimony and records submitted into the record.

13. Scott Wilkinson's sole dependents at the time of his death were his wife, Lea Ann Wilkinson, and his son, Tyler Wilkinson. This finding is based on all the evidence, including claimant's testimony and reports and records submitted into the record.

14. Scott Wilkinson earned profit of $51,087.00 on income of $146,074.00 in 2001 entitling him to a compensation rate of $549.42, the maximum compensation rate for injury by accident occurring in 2002. This finding is based on all the evidence on the record, including the

parties' stipulation and pay and tax information submitted into the record.

15. Scott Wilkinson was covered under an Occupational Accident policy issued by Zurich American Insurance Company at the time of his death. This finding is based on all the evidence, including claimant's testimony, the Occupational Accident policy, and other records submitted into the record.

16. Scott Wilkinson paid all of the premiums for the Occupational Accident policy he obtained from Zurich, and Palmetto State Transportation Company did not contribute to the policy or premiums in any way. This finding is based on all the evidence, including claimant's testimony, the testimony of Dennis Mersereau, and records submitted into the record.

## RULINGS OF LAW

1. Under S.C. Code Ann. §§ 42-1-130 to -150, the South Carolina Workers' Compensation Commission has jurisdiction over claimant's claim for benefits. See also Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct.App.1987)(Commission has subject matter jurisdiction where employee/employer relationship existed at the time of accident).

2. Under S.C. Code Ann. §§ 42-1-130 to -150, an employee/employer relationship existed between Scott Wilkinson and Palmetto State Transportation Company at the time of Scott Wilkinson's death. See also Spivey v. D.G.

Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(existence of employment relationship hinges on right and authority to control and direct the work as to the manner or means of its accomplishment, which is evaluated through direct evidence of the right or exercise of control, method of payment, furnishing of equipment, and right to fire.); Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002)(fact that cab driver could choose when to drive his cab was not dispositive of the control issue, since employer controlled the method and means of his driving when he chose to drive); South Carolina Work. Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995)(employer's determination of hours worked and manner in which work is to be done is direct evidence of right or exercise of control); Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970)(power to fire is power to control and absolute right to terminate relationship without liability is inconsistent with concept of independent contract); Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct.App.1987)(requirement that worker work exclusively for employer is direct evidence of right or exercise of control).

3. The May 1999 agreement between Palmetto State Transportation Company and Scott Wilkinson (and the subsequent agreement of July 2000) and the titles used by the parties to describe their relationship are not dispositive of the form of the relationship or of the issues of control or the right to fire. Nelson v. Yellow Cab

Co., 349 S.C. 589, 564 S.E.2d 110 (2002). See also S.C. Code Ann. § 42-1-460 (contract between employer and employee presumed to be subject to the Workers' Compensation Act); S.C. Code Ann. §42-1-610 (no contract, agreement, rule, regulation, or other device shall operate to relieve an employer of an obligation created by the Act); S.C. Code Ann. § 42-1-620 (no agreement by an employee to waive rights to compensation under Act shall be valid).

4. As an alternative ground under S.C. Code Ann. § 42-1-400 and to the extent Scott Wilkinson may be considered a subcontractor of Palmetto State Transportation Company under the May 1999 agreement, Palmetto contracted with Scott Wilkinson to perform work which is a part of its trade, business, or occupation and therefore is his statutory employer and is liable to pay benefits under the Act as if he was directly employed by Palmetto.

5. As an alternative ground and to the extent Scott Wilkinson may be considered a subcontractor of Palmetto State Transportation Company under the May 1999 agreement, Scott Wilkinson was covered under Palmetto's workers' compensation policy at the time of his death due to Palmetto's deduction of a workers' compensation insurance premium from his pay the week before his death. Harris v. Criterion Ins. Co., 281 S.E.2d 878 (Va. 1981)(mistaken acceptance of a premium can reinstate the underlying insurance policy or give rise to an estoppel if the sum is not refunded within a reasonable time). See also Gordon v. Colonial

Ins. Co. of California, 342 S.C. 152, 536 S.E.2d 376 (Ct.App.2000).

6. Under S.C. Code Ann. § 42-1-160, Scott Wilkinson sustained injury by accident arising out of and in the course of his employment with Palmetto State Transportation Company on May 16, 2002 resulting in his death.

7. Under S.C. Code Ann. § 42-1-40 and S.C. Code Reg. 67-1603, Scott Wilkinson's average weekly wage was such that the compensation rate for this claim is $549.42.

8. Under S.C. Code Ann. §§ 42-9-290, Scott Wilkinson's dependants are entitled to and defendants Palmetto State Transportation Company and Canal Insurance Company are responsible for payment of 500 weeks compensation at the rate of $549.42 per week and burial expenses up to but not exceeding $2,500.00.

9. Under S.C. Code Ann. §§ 42-1-70, -175 and §§ 42-9-110, -130, Scott Wilkinson's sole dependents at the time of his death, his surviving spouse, Lea Ann Wilkinson, and his minor son, Tyler Wilkinson, are each entitled to one-half of the benefits awarded herein.

10. Under S.C. Code Ann. §§ 42-15-55, Tyler Wilkinson's mother, Lea Ann Wilkinson, is appointed his guardian *ad litem* for the purpose of this claim.

11. Under S.C. Code Ann. §§ 42-9-320, payment of benefits to Tyler Wilkinson in this claim must be made to a person appointed for that purpose by the probate court.

12. The Occupational Accident policy Scott Wilkinson purchased from Zurich American Insurance Company is a collateral source and, therefore, Palmetto State Transportation Company and Canal Insurance Company are not entitled to receive credit for benefits paid under that policy or to receive benefits directly from that policy. McLeod v. S.C. Ins. Co., 272 S.C. 254, 251 S.E.2d 193 (1979). See also Estate of Ratenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989)(collateral source rule prevents defendant from offsetting its liability for insurance proceeds received by injured party as a result of a premium paid by the injured party).

## ORDER

It is ordered that defendants Palmetto State Transportation Company and Canal Insurance Company shall pay death benefits in the amount of $549.42 per week for a total of 500 weeks to Scott Wilkinson's sole dependents, Lea Ann Wilkinson and Tyler Wilkinson, in equal shares and shall reimburse burial expenses up to but not exceeding $2,500.00.

No hearing costs are assessed in this instance.

S.C. Workers' Compensation Commission

*/s/* _____
G. Bryan Lyndon, Commissioner

Date: _____

* * *

*[Certificate of Service omitted from printing of this appendix]*

## APPENDIX F

### THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
Clerk of Court

Post Office Box 11330
Columbia, South Carolina 29211

BRENDA F. SHEALY
Chief Deputy Clerk

(803) 734-1080
Fax (803) 734-1499

May 28, 2009

Kathryn Williams, Esquire
P.O. Box 10693
Greenville, SC 29603

Re: Wilkinson, Lea v. Palmetto State Trans.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.